No. 75

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

FORD MOTOR COMPANY,

Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, AND FRANK G. THOMPSON, AS AND CONSTITUTING THE DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Respondents.

PETITIONER'S REPLY BRIEF

MERLE H. MILLER,
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INDEX

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JURISDICTION

For the first time in these proceedings, respondent has questioned the jurisdiction of the Federal Court to entertain suit by this non-resident taxpayer against the Department of Treasury of the State of Indiana, respondent admitting that if it be within the power of the administrative and executive officers of the state to waive the

state's immunity, then such immunity has been waived in this action. That the right of waiver exists has long been recognized by this Court. *Clark v. Barnard*, 108 U. S. 436, 447; 27 L. Ed. 780, 784.

Respondent questions, however, whether any state official has the power to waive the state's immunity in the light of Article 4, Section 24, of the Constitution of Indiana, which reads:

> "Provision may be made by general law for bringing suit against the state, as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the state, shall ever be passed."

Pursuant to the above authorization, the legislature provided in the Gross Income Tax Law of 1933, as amended by the Act of 1937:

> "Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected." (Sec. 14 (a)).

Section 28 of the same act vests the administration of the Gross Income Tax Act in the Department of Treasury, and Section 14 (c) makes it the duty of the Attorney General "to represent the department, and/or the State of Indiana, in all legal matters or litigation, either criminal

or civil, relating to the enforcement, *construction*, application and administration of this act, upon the order and under the direction of the department."

In the enforcement of the Gross Income Tax Act, the Department of Treasury, through the office of the Attorney General, has entered its appearance and has litigated controversies with non-resident defendants in the following cases in the Federal Court:

Wood Preserving Corporation v. The Department of Treasury filed in the District Court, October 18, 1938. Appealed to Circuit Court of Appeals, Seventh Circuit, 114 Fed. (2d) 889. Decision of United States Supreme Court, 313 U. S. 62; 85 L. Ed. 1188;

Continental Roll & Steel Foundry Company v. Department of Treasury filed in District Court April 8, 1939. Appealed to Circuit Court of Appeals, 117 Fed. (2d) 196;

Ingram-Richardson Manufacturing Company, v. Department of Treasury filed March 15, 1939. Appealed to Circuit Court of Appeals, 114 Fed. (2d) 889; Cert. Denied 312 U. S. 687; 85 L. Ed. 1124;

Hicks Body Company v. Department of Treasury filed in District Court February 26, 1941, decided Oct. 2, 1941, no appeal;

Holland Furnace Company v. Department of Treasury filed March 22, 1941. Appealed to Circuit Court of Appeals, 133 Fed. (2d) 212; Cert. Denied 88 L. Ed. Adv. Op. 30;

Great Lakes Dredge & Dock Company v. Department of Treasury filed March 22, 1941. Consolidated with Holland Furnace Company case;

Interstate Roofing & Supply Company v. Department of Treasury filed March 22, 1941. Consolidated with Holland Furnace Company case.

By this course of action, the Department of Treasury has interpreted the clause "any court of competent jurisdiction" as including the Federal District Court. A similar interpretation has been placed upon similar words by this Court. In construing a state statute permitting suit "in a court of competent jurisdiction in Travis County, Texas," this Court said:

> "The Circuit Court for the Western District of Texas is 'a court of competent jurisdiction in Travis County'."
>
> *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 391; 38 L. Ed. 1014, 1021.

Wholly apart from the reasonableness of such a construction, the subsequent wording of the act might be regarded as compelling this result. The county courts are given jurisdiction of cases involving taxpayers resident in that county. Non-resident taxpayers are given a cause of action, but could not comply with the venue requirements of the state courts, so that the statute might well be construed as leaving only the Federal courts open as a "competent court" for the enforcement of a right expressly given under the statute to non-resident taxpayers.

In entering its appearance and defending the present case on the merits, the Department was therefore not acting in contravention of the Constitution of Indiana in allowing a special suit to be brought. The legislature had already authorized the bringing of suit against the state in general terms, and in the interpretation of that language the Department of Treasury adopted a course of action permitting all non-resident taxpayers to sue in the Federal Court. Since this question goes not to the existence of the remedy against the state, but merely to the forum for the enforcement of that remedy, and since the interpretation by the Department is reasonable and of general application so as not to constitute any special act, the interpretation adopted by the Department of Treasury should be held valid by this Court, and the case should here be decided upon its merits as other cases brought under this same act have been decided upon the merits by this Court.

In *Great Northern Life Insurance Co. v. Reed*, 322 U. S. 47, this court held that the 11th Amendment permitted State officials successfully to contest jurisdiction of the Federal Court where the statute authorized suit in "the court having jurisdiction thereof," and further provisions indicated state courts as the ones intended by the legislature. But here the State officials construed the statute as authorizing suits in the Federal court. To find the Federal Court without jurisdiction here would require a holding that the 11th Amendment prohibited State officials from invoking the jurisdiction of the Federal Court as was done in the prayer for relief in Respondent's answer in the District Court, and as has been done in the other cases cited above.

PETITIONER'S CLAIM FOR REFUND

Respondent asserts that petitioner has not complied with a condition precedent to this suit in that the claim for refund filed by petitioner allegedly did not state as a reason the fact that the income was exempt under Section 2 of the Act of 1933, as amended in 1937. Wholly apart from the claim for refund, which is not a part of the record, petitioner's complaint sought recovery on the ground, among others, that the tax was predicated upon gross receipts from sources outside the State of Indiana, which receipts were exempt from tax under Section 2 of the Act of 1933, as amended in 1937. (R. 8.) Respondent's answer did not assert any technical deficiency in the claim for refund which had been filed, but denied that the source of the income was from outside of Indiana. (R. 22.) After a trial on the merits of the controversy on the issues thus formed, it is too late now for respondent to assert a formal deficiency in the claim for refund. *Federal Equity Rules*, 12 (b) (h).

APPLICATION OF THE INTERNATIONAL HARVESTER COMPANY CASE

Respondent has attached to its brief as Appendix D the sales contract involved in *Department of Treasury v. International Harvester Co.* (1943), 221 Ind. 416, which decision with respect to Class A sales is regarded by petitioner as controlling with respect to the Class A sales in this case. That sales contract which was included in the record in Cause 355, October Term 1943, *International Harvester Co. v. Department of Treasury*, 321 U. S. ....., permits an accurate comparison between the conditions under which Class A sales were effected in that case and

the conditions surrounding the Class A sales in this case. Keeping in mind that there was no solicitation of orders in Indiana with respect to Class A sales here involved, whereas there was solicitation of the Class A sales by agents of the seller in Indiana in the International Harvester case, the following is a comparison of the conditions surrounding Class A sales in each case according to the contracts in effect with the dealers in each instance:

Ford Contract	*International Harvester Contract*
Acceptance of Orders	
Outside Indiana	Outside Indiana
Delivery	
To carrier as agent for buyer outside Indiana	At point of shipment outside Indiana
Title	
Reserved in seller until payment	Reserved in seller until payment
Risk of Loss	
On buyer from time of delivery to carrier outside Indiana	On buyer from time of delivery to carrier outside Indiana
Payment	
At branch outside Indiana or to carrier in Indiana for transmission to seller outside Indiana	According to schedule attached to each contract. No schedules are in the record.

The only conceivable difference between the two cases relates to the method of payment which was not covered specifically in the International Harvester case, but which in the present case was found in some instances to be made to the carrier as agent for the seller. This agency on the part of the carrier would be no different than the agency relationship existing in any C. O. D. shipment, and does not affect the place of sale nor the source of the income. In *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62; 85 L. Ed. 1188, railroad ties were accepted by the purchaser in Indiana, but payment was made to the seller in Pittsburgh, Pennsylvania. Yet this Court held that the place of sale governed the application of the Indiana Gross Income Tax and the place of payment was not determinative.

The decision of the Indiana Supreme Court in *Department of Treasury v. International Harvester Company* would therefore govern the application of tax to the Class A sales for those years prior to 1937, and would govern with respect to the year 1937 unless the amendments effected in 1937 materially changed the act so as to require a different result. The amendment of 1937 was actually a re-enactment of the Gross Income Tax Act of 1933, wherein the original act was completely re-written, and in some instances completely rearranged, the act being almost doubled in length in this process of revision. Section 2 of the Act of 1933 was altered as a part of this revision by the elimination of the words in struck type below and the addition of the words in italics:

> "Such tax shall be levied • • • upon the receipt of gross income derived from ~~sources~~ *activities or business or any other source* within the State of Indiana, of all persons ~~and or companies, includ-~~

~~ing banks,~~ who are not residents of the State of Indiana, ~~but are engaged in business in this State or who derive gross income from sources within this State~~ * * *."

Thus the Act of 1933 levied the tax on gross income, derived from sources within the state, of non-residents engaged in business in the state or who derived gross income from sources within the state. This definition was shortened so as to provide that the tax should be levied upon the receipt of gross income by non-residents, derived from activities or business or any other source within the state. This was a mere revision in phraseology, and there is no apparent difference in meaning between the original phraseology of the 1933 Act and the somewhat shorter phraseology of the 1937 Act. In either event, the income to be taxed must be derived from sources within the state since the inclusion of the word "other" in the phrase "activities or business or any other source" necessarily means that the activities or business referred to must also be sources of the income. Since the Supreme Court of Indiana in the International Harvester case held that the source of the income with respect to Class A sales in that case was without the State of Indiana, a similar result is required in this case with respect to Class A sales under the 1937 amendment as well as under the 1933 original act.

CONCLUSION

All sales involved in the issue before this Court were sales wherein a car was built according to the order and specifications of a particular dealer, which specifications were checked and the car accepted at the location of the

branch outside Indiana. (R. 52.) A representative of the carrier acting under express authority of the dealer accepted the car on behalf of the dealer and assumed responsibility for the purchase price to the seller. (R. 53, 56.) All events occurring thereafter were merely the fulfillment of obligations assumed by the carrier and could not be said to be a source of the income to the seller, who was entitled to the sale price in full regardless of the subsequent acts of the carrier.

The carrier stored the car until such time as other deliveries warranted a trip to the location of the dealer. (R. 54.) Thereafter the carrier delivered the car to the dealer and received cash in an amount equal to the difference between the amount owing for the car and the amount of the finance papers which the carrier had executed on behalf of the dealer, or which the dealer thereupon executed. (R. 53.) If, in the collection of this cash, and in some instances the finance papers, and the transporting of such to the seller, it can be said that the carrier was acting as the agent of the seller, then it was an agency of no different character than that which obtains in every C. O. D. contract. But where, as here, the carrier has previously assumed responsibility for the purchase price, the subsequent acts of the carrier in Indiana cannot be said to be the source of the income to the seller, but instead that source is at the branch outside Indiana where the carrier accepted the car on behalf of the dealer and assumed responsibility for the purchase price.

The application of the International Harvester Company case, 221 Ind. 416, places the source of the income outside the state, and renders non-taxable the income so derived. Any other construction would be to project the

powers of Indiana beyond its borders and to tax an interstate transaction. *McLeod v. J. E. Dilworth Co.*, 64 Sup. Ct. Rep. 1023, No. 311, decided May 15, 1944.

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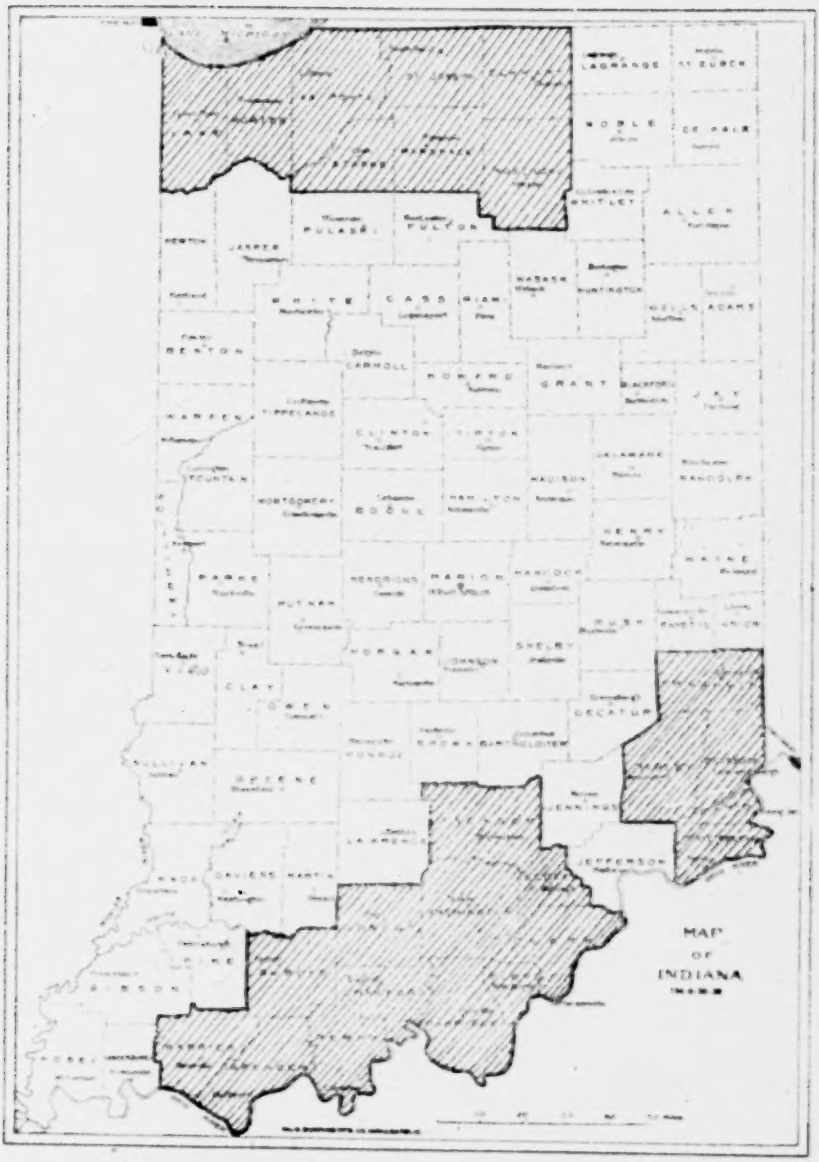
APPENDIX A



Class A sales involved in this case were made only in the shaded areas. Sales to dealers in other portions of Indiana were made through a branch at Indianapolis, and the application of the tax is not questioned in this case.